## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Nos. 510-11—September Term, 1966.

(Argued June 15, 1967. Decided July 20, 1967.)

Docket Nos. 30947-30948

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PAN AMERICAN WORLD AIRWAYS, INC., TRANS WORLD AIRLINES, INC., AMERICAN AIRLINES, INC.,
*Petitioners,*

*v.*

CIVIL AERONAUTICS BOARD,
*Respondent,*

WORLD AIRWAYS, INC., ET AL.,
*Intervenors.*

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Before:

HAYS and FEINBERG, *Circuit Judges*, and MCLEAN, *District Judge.**

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Petition to review orders of the Civil Aeronautics Board awarding certain supplemental air carriers certificates which authorize them, *inter alia*, to operate so-called "inclusive tours" between points in the United States and various foreign points.

Orders set aside to the extent that they authorize "inclusive tours." Case remanded for further proceedings not inconsistent with this opinion.

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* Of the Southern District of New York, sitting by designation.

EDWARD R. NEAHER, New York, New York (Carl S. Rowe, Gertrude S. Rosenthal and Chadbourne, Parke, Whiteside & Wolff, on the brief), *for Petitioners.*

WARREN L. SHARFMAN, Associate General Counsel, Litigation and Legislation, Civil Aeronautics Board (Donald F. Turner, Assistant Attorney General, Joseph B. Goldman, General Counsel, Civil Aeronautics Board, O. D. Ozment, Deputy General Counsel, Civil Aeronautics Board, Robert L. Toomey, Attorney, Civil Aeronautics Board and Howard E. Shapiro, Attorney, Department of Justice, on the brief), *for Respondent.*

CHARLES A. HOBBS, Washington, D. C. (Glen A. Wilkinson, Paul S. Quinn and Wilkinson, Cragun & Barker, on the brief), *for Intervenor American Society of Travel Agents, Inc.*

CLAYTON L. BURWELL, Washington, D. C., Counsel for Trans International Airlines, Inc., and RAYMOND J. RASENBERGER, Washington, D. C., Counsel for Purdue Aeronautics Corp., and World Airways Inc. (Stephen D. Potts, Washington, D. C., Counsel for American Flyers Airlines, Inc., George Berkowitz, New York, New York, Counsel for Capitol Airways, Inc., and Leonard N. Bebchick, Washington, D. C., Counsel for Saturn Airways, Inc., on the brief), *for the Intervenor Supplemental Air Carriers.*

HAYS, *Circuit Judge*:

This is a petition to review five orders of the Civil Aeronautics Board awarding certain supplemental air carriers, intervenors in this action, certificates which authorize them to operate so-called "inclusive tours" [1] between points in the United States and various foreign points. Petitioners' principal contention is that the Board lacked the power to authorize inclusive tours. The jurisdiction of this court is invoked under Section 1006 of the Federal Aviation Act of 1958, 49 U. S. C. § 1486. We hold that the Board lacked the power to authorize "inclusive tours" and that the challenged provisions should be stricken from the certificates awarded to the intervening carriers.

I.

Petitioners are three air carriers holding certificates of public convenience and necessity issued by the Civil Aeronautics Board under Section 401(d)(1) of the Federal Aviation Act, 49 U. S. C. § 1371(d)(1), authorizing them to engage in air transportation between the United States and various points abroad. Each of the intervenors, with the exception of the American Society of Travel Agents, Inc., is a supplemental air carrier [2] defined under Section

[1] The term "inclusive tour" is, generally speaking, synonymous with the more familiar "all expense" or "package" tour. Such a tour includes various land arrangements, for example, hotel accommodations, meals and sightseeing, as well as air transportation. "Inclusive tour charters" are arrangements by which the air carrier charters a plane to a "tour operator" or travel agent who sells the entire package to the public for a single price per person. In this opinion we adopt this terminology which was used by the Board although not by the hearing examiner.

[2] At earlier stages of the development these carriers were known variously as "non-scheduled" or "large irregular" air carriers. Their history has been marked by frequent controversy and litigation. See, e.g., *Great Lakes Airlines, Inc.* v. *Civil Aeronautics Board*, 294 F. 2d 217, 221, n. 6 and cases there cited (D. C. Cir.), cert. denied, 366 U. S. 965 (1961).

101(32) of the Act, 49 U. S. C. § 1301(32), as "an air carrier holding a certificate of public convenience and necessity authorizing it to engage in supplemental air transportation." As the name implies, the services of supplemental air carriers are intended to supplement those of the scheduled carriers. See Section 101(33) of the Act, 49 U. S. C. § 1301(33).

In July 1962, Congress enacted Public Law 87-528, 76 Stat. 143, amending the Federal Aviation Act of 1958. The amendment established a comprehensive system for the certification and regulation of supplemental air carriers. In particular, it empowered the Civil Aeronautics Board to grant certificates of public convenience and necessity authorizing these carriers to engage in "supplemental air transportation." Section 401(d)(3), 49 U. S. C. § 1371(d)(3).[3] "Supplemental air transportation" was defined as "charter trips in air transportation . . . to supplement the scheduled service" which regular route carriers such as petitioners are authorized to provide. Section 101(33), 49 U. S. C. § 1301(33).

On March 11, 1966 the Board handed down opinions and orders in proceedings known as the *Supplemental Air*

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[3] § 1371. *Certificate of public convenience and necessity*

(d) *Issuance*

* * * * *

(3) In the case of an application for a certificate to engage in supplemental air transportation, the Board may issue a certificate, to any applicant not holding a certificate under paragraph (1) or (2) of this subsection, authorizing the whole or any part thereof, and for such periods, as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform the transportation covered by the application and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder. Any certificate issued pursuant to this paragraph shall contain such limitations as the Board shall find necessary to assure that the service rendered pursuant thereto will be limited to supplemental air transportation as defined in this chapter.

*Service Proceeding* and the *Reopened Transatlantic Charter Investigation.*

One of the orders, issued in the *Supplemental Air Service Proceeding,* Docket No. 13795, approved the certification of certain supplemental air carriers in the domestic area and authorized them to operate inclusive tour charters. CAB Order No. E-23350 (March 11, 1966). Other orders issued under the same name and docket number, (1) approved the certification of certain supplemental carriers to operate in various overseas and foreign areas [4] and authorized them to operate inclusive tours (CAB Order No. E-24237 (March 11, 1966)), and (2) adopted proposed regulations defining various terms and setting out the scope of the carriers' inclusive tour authorization (CAB Order No. E-24238 (March 11, 1966)).

Two other orders were issued the same day under the title *Reopened Transatlantic Charter Investigation* (All-

[4] Section 101(21) of the Act, 49 U. S. C. § 1301(21) provides:

"Interstate air transportation," "overseas air transportation," and "foreign air transportation," respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possesion of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

Expense Tour Phase), Docket No. 11908. Under the first of these orders, the right to operate inclusive tours was added to the certificates previously granted to Capitol Airways and Saturn Airways authorizing them to engage in supplemental air transportation in the transatlantic area. CAB Order No. E-24240 (March 11, 1966). The second order adopted for the authorized transatlantic supplemental cariers the regulations referred to above. (CAB Order No. E-24241 (March 11, 1966).

Under the statute the orders concerned with foreign air transportation entered in the *Reopened Transatlantic* and *Supplemental Air Service* cases were subject to the President's approval. See Section 801 of the Act, 49 U. S. C. § 1461.[5] Those are the orders now before us for review. No presidential approval was required for the domestic orders entered in the *Supplemental Air Service Proceeding*. They immediately became final and subject to judicial review. The petitioners in the instant case were among the parties who sought judicial review of the Board's domestic orders in the Court of Appeals for the District of Columbia Circuit, contending primarily that the Board exceeded its statutory powers in granting supplemental carriers inclusive tour authority. That court had previously decided the "split charter"[6] case, *Ameri-*

[5] § 1461. *The President of the United States*

The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 1372 of this title, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof.

[6] A split charter "is simply the process of chartering one half of an aircraft to each of two unrelated charter groups." *American Airlines* v. *Civil Aeronautics Board*, 348 F. 2d 349, 354 (D. C. Cir. 1965).

*can Airlines, Inc.* v. *Civil Aeronautics Board*, 348 F. 2d 349 (D. C. Cir. 1965), in which it had said:

> "Congress intended, although not without limits, that the Board should be free to evolve a definition [of 'charter trips,' 49 U. S. C. § 1301(33)] in relation to such variable factors as changing needs and changing aircraft . . . ." 348 F. 2d at 354.

Relying in part on the quoted statement and in part on its own analysis of the relevant legislative history, the court rejected the contention that Congress had not empowered the Board to authorize inclusive tours. *American Airlines* v. *Civil Aeronautics Board*, 365 F. 2d 939 (D. C. Cir. 1966).

Thereafter, on September 27, 1966, the orders concerning foreign air transportation were approved by the President. Petitioners now seek review of the orders in this court contending that the Board exceeded its statutory powers in granting inclusive tour authority to supplemental air carriers. They also urge that the Board erred in denying them a hearing before it granted inclusive tour authority to the supplemental carriers involved in the *Reopened Transatlantic Charter Investigation* and that the orders are unlawful under the statute since they were approved by only two members of the five man Board, one member dissenting and two not participating.

In view of our decision that the grant of authority for inclusive tours was beyond the Board's power, we find it unnecessary to reach the other points raised by petitioners.

The Board contests petitioners' claims on the merits. It also argues that its power with respect to the orders in question was conclusively determined in the prior action involving these petitioners, *American Airlines* v. *Civil Aeronautics Board*, *supra*, 365 F. 2d 939, and that the doctrine of *res judicata* precludes relitigation of this issue.

## II.

The Board has moved that the appeal be dismissed or transferred to the Court of Appeals for the District of Columbia Circuit. It is conceded that our court has jurisdiction of the petition and that venue is proper under Section 1006 of the Act, 49 U. S. C. § 1486. However, the Board argues that petitioners are guilty of forum-shopping, seeking a determination from this court contrary to that reached by the District of Columbia Circuit, thus enhancing their opportunity for review in the Supreme Court of the legal issues here tendered. We are urged to transfer the appeal, either under the provisions of 28 U. S. C. § 2112,[7] or in the exercise of our inherent discretionary power.

Section 2112 authorizes transfer only where "proceedings have been instituted in two or more courts of appeals with respect to the same order." It is clear that the orders before us are not the same as those reviewed by the Court of Appeals for the District of Columbia Circuit. See *Far East Conference* v. *Federal Maritime Comm'n*, 337 F. 2d

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[7] § 2112. Record on review and enforcement of agency orders.

(a) The several courts of appeals shall have power to adopt, with the approval of the Judicial Conference of the United States, rules, which so far as practicable shall be uniform in all such courts prescribing the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers, to the extent that the applicable statute does not specifically prescribe such time or manner of filing or contents of the record . . . . If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all of the proceedings with respect to such order to any other court of appeals.

146, 148 n. 1 (D. C. Cir. 1964), cert. denied, 379 U.S. 991 (1965).

Even assuming that this court has inherent discretionary power to transfer a case to another court of appeals in the interests of orderly judicial administration (but see *Gulf Oil Corp.* v. *Federal Power Comm'n*, 330 F. 2d 824 (5th Cir. 1964)), we find nothing in the decided cases that would justify us in transferring this case to the District of Columbia Circuit. We have jurisdiction of the action and, since petitioners' principal place of business is in the Second Circuit, venue is properly laid. Cf. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n*, 343 F. 2d 905 (8th Cir. 1965); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n*, 337 F. 2d 249 (10th Cir. 1964). Reaching the merits in this case will not require us to construe a prior order of another circuit (cf. *Pacific Gas & Electric Co.* v. *Federal Power Comm'n*, 272 F. 2d 510 (D. C. Cir. 1958) (accepting transfer from 9th Circuit)) and we are not presented with the very unusual circumstances thought by the court to justify transfer in *Eastern Air Lines* v. *Civil Aeronautics Board*, 354 F. 2d 507 (D. C. Cir. 1965).

In the absence of any showing of inconvenience to respondent, we are not convinced that there are any interests of sound judicial administration which suggest that this case should be transferred. We can perceive no reason for treating this case as an exception to the principle affording a litigant wide latitude in his selection of a forum where Congress has given him a choice.

III.

The Board's motion to dismiss is based on its contention that the doctrine of *Chicago & S. Air Lines* v. *Waterman S. S. Co.*, 333 U.S. 103 (1948), precludes review of the Board's challenged orders and that, in any event, principles of *res judicata* prevent petitioners from reliti-

gating the issues. We hold that neither the *Waterman* doctrine nor principles of *res judicata* bar us from deciding the merits of petitioners' claim.

In the *Waterman* case petitioner sought to invalidate a Board order awarding route authority for overseas and foreign air transportation. In accordance with Section 801 of the statute, 49 U. S. C. § 1461 (reprinted in footnote 5 *supra*), the order had been submitted to the President and had been approved by him. Petitioner did not challenge the regularity of the Board's proceedings and apparently raised no issue as to the Board's statutory authority; instead it attacked the correctness of the Board's findings and the adequacy of the evidence supporting them. The Supreme Court held that:

> "[O]rders of the Board as to certificates for overseas or foreign air transportation are not mature and are therefore not susceptible of judicial review at any time before they are finalized by Presidential approval. After such approval has been given, the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate." 333 U.S. at 114.

We need not decide whether, as has been argued, the *Waterman* decision rests on a misinterpretation of Section 1006 of the Act, 49 U. S. C. § 1486 providing for judicial review of the Board's orders. See Miller, the *Waterman* Doctrine Revisited, 54 Geo. L. J. 5, 6-9 (1965). We agree with the Court of Appeals for the District of Columbia Circuit that the *Waterman* case does not "govern a situation where the action of the Board, before the matter reaches the President, is beyond the Board's power to act." *American Airlines* v. *Civil Aeronautics Board*, *supra*, 348 F. 2d at 352. As the court there stated:

> "Clearly, *Waterman* presupposes lawfully exercised congressional authority in the Board's action, in the

first instance, as an indispensable predicate, without which there is nothing Presidential action can approve." *Ibid.*; *cf. id.* at 354-55 (concurring opinion); see generally, Miller, *op. cit. supra.*

*Waterman*, therefore, presents no obstacle to the attack on the Board's orders in this case.

We also reject the Board's contention that the doctrine of *res judicata* bars further litigation of the issues now before us.

The principles to be applied were summarized by the Supreme Court in *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948):

> "[I]f the very same facts and no others are involved in the second case . . . the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change. But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case." 333 U.S. at 601 (footnote omitted); see *Consolidated Edison Co.* v. *United States*, 279 F. 2d 152, 154 (2d Cir. 1960), aff'd 366 U.S. 380 (1961); cf. *Federal Power Comm'n* v. *Amerada Petroleum Corp.*, 379 U.S. 687, 690 (1965); *United States* v. *Stone & Downer Co.*, 274 U.S. 225 (1927); *Grandview Dairy* v. *Jones*, 157 F. 2d 5, 9, 10 (2d Cir.), cert. denied, 329 U.S. 787 (1946); see generally Developments in the Law—*Res Judicata*, 65 Harv. L. Rev. 818, 843-44 (1952).

More recently, in *Yates* v. *United States*, 354 U.S. 298 (1957), the Court said that the

> "doctrine makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision. *Commissioner* v. *Sunnen*, 333 U.S. 591, 601-602; *Tait* v. *Western Maryland R. Co.*, 289 U.S. 620 [1933]; *The Ever-*

*greens* v. *Nunan*, 141 F. 2d 927, 928 [(2d Cir.), cert. denied, 323 U.S. 720 (1944)]." 354 U.S. at 336; See Restatement, Judgments § 70, comment e.

The operative facts in this case, involving overseas and international air transportation, are different from those before the District of Columbia Circuit in the domestic charter case. Separate exhibits relating to each area were admitted in the proceedings before the Board. In their opinions the Board and examiner considered each area separately, noting, for example, the different amounts of charter traffic involved and the different consequences, in terms of potential diversion of passengers from the regularly scheduled carriers, that inclusive tours would have in each market. The orders here challenged became final at a different time and are clearly distinguishable from those involved in the domestic charter litigation.

None of the cases cited by the Board supports the conclusion that principles of *res judicata* preclude litigation of the question of law here involved. For example, the "order" challenged in *Cities Service Co.* v. *Securities and Exchange Comm'n*, 257 F. 2d 926 (3d Cir. 1958) was merely a phase of the order which had been previously upheld by this court in *Cities Service Co.* v. *Securities and Exchange Comm'n*, 247 F. 2d 646 (2d Cir. 1957), cert. denied, 355 U.S. 912 (1958). Petitioner was thus properly precluded from relitigating the issue. *Bartsch* v. *Washington Metropolitan Area Transit Comm'n*, 357 F. 2d 923 (4th Cir. 1966) is distinguishable on similar grounds.

This court has said that "the law of collateral estoppel is 'growing law.'" *United States* v. *Russell Mfg. Co.*, 349 F. 2d 13, 18-19 (2d Cir. 1965); see also *B. R. DeWitt, Inc.* v. *Hall*, 19 N. Y. 2d 141, 278 N. Y. S. 2d 596 (1967). Nevertheless judicial aversion to forum shopping is not a sufficient ground for precluding litigation of a question of law by extending the doctrine of *res judicata* into areas

traditionally governed by "the ordinary rule of stare decisis." *Commissioner* v. *Sunnen, supra,* 333 U.S. at 601; cf. *Island Airlines, Inc.* v. *Civil Aeronautics Board,* 363 F. 2d 120, 123 (9th Cir. 1966). We therefore consider ourselves free "to make an independent examination of the legal matters at issue." *Commissioner* v. *Sunnen, supra,* 333 U.S. at 601.

## IV.

The question before us is whether the Board's statutory authority to issue certificates of public convenience and necessity for "supplemental air transportation," defined as "charter trips in air transportation," (Section 101(33) of the Act, 49 U. S. C. § 1301(33)) includes the power to authorize inclusive tour charters.[8] Consideration of the legislative history of the Act leads us to the conclusion that the term "charter trips" was not intended to embrace the inclusive tour charters authorized by the Board's orders.

The provisions in question were added to the Federal Aviation Act by Public Law 87-528. As we have pointed out this amendatory legislation established a comprehensive system for the certification and regulation of supplemental air carriers. Its principal purposes were to clarify the permissible field of operations of the supplemental carriers,[9] to assure their economic viability, to eliminate

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[8] The question presented is not whether Congress withdrew from the Board a pre-existing power to grant inclusive tour authority. "[P]rior to 1962 the Board had never authorized inclusive tour authority for the supplementals." *American Airlines* v. *Civil Aeronautics Board, supra,* 365 F. 2d at 946. See also Hearings Before the Aviation Subcommittee of the Senate Committee on Commerce, 87th Cong., 1st Sess. 111 (1961).

[9] The statute was in part a response to the decisions in *United Air Lines* v. *Civil Aeronautics Board,* 278 F. 2d 446 (D. C. Cir.), vacated, 364 U. S. 297 (1960) and *American Airlines* v. *Civil Aeronautics Board,* 235 F. 2d 845 (D. C. Cir. 1956), cert. denied,

marginal and unsafe operators and "to maintain the regulatory scheme of the Federal Aviation Act and the protection of the certificated carriers such as petitioners by eliminating unregulated individually ticketed point-to-point competition from the supplementals." *American Airlines, Inc.* v. *Civil Aeronautics Board, supra*, 365 F. 2d at 944-45; see authorities cited *id.*, at n. 8.

The bill which evolved into Public Law 87-528 was prepared by the Board and introduced in both houses of Congress early in the 87th Congress. See S. 1969, 87th Cong., 1st Sess. (1961); H. R. 7318, 87th Cong., 1st Sess. (1961). Also introduced in the House was a bill proposed by the supplemental air carriers, H. R. 7512, 87th Cong., 1st Sess. (1961).

The definition of "supplemental air transportation" found in the Board's bill [10] would have permitted the Board to certify supplemental air carriers to perform a broad range of services including not only existing charter services but also the limited individually ticketed trans-

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353 U. S. 905 (1957), which the Board thought had placed in doubt the statutory basis for the continued operation of supplemental carriers under existing law. See Hearings Before the Aviation Subcommittee of the Senate Committee on Commerce, 87th Cong., 1st Sess. 5, 281-83 (1961); Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 87th Cong., 1st Sess. 10, 13, 29 (1961).

[10] The Board's bill provided:

"(32) 'Supplemental air carrier' means an air carrier holding a certificate of public convenience and necessity authorizing it to engage in supplemental air transportation.

"(33) 'Supplemental air transportation' means air transportation rendered pursuant to a certificate of public convenience and necessity which contains such limitations as to frequency of service, size or type of equipment, or otherwise, as will assure that the service so authorized remains supplemental to the service authorized by certificates of public convenience and necessity issued pursuant to sections 401(d)(1) and (2) of this Act."

portation for the general public that was then permitted under temporary legislation passed by Congress. See Public Law 86-661, 74 Stat. 527 (1960); H. R. 7318, Section 2, 87th Cong., 1st Sess. (1961); see also Public Law 87-528, Section 7, reprinted after 49 USC § 1371. The definition contained in the bill proposed by the supplemental carriers went even further. It would have authorized "unlimited charter operations on a planeload basis for the carriage of passengers and property . . . with the word 'charter' herein being defined as air transportation performed pursuant to an agreement for the use of the entire capacity of an aircraft . . . ." H. R. 7512, 87th Cong., 1st Sess. (1961). It also would have permitted "individually ticketed passenger . . . operations . . . in interstate, overseas and territorial air transportation." *Ibid.*

Hearings at which representatives of the Board, the scheduled aircarriers and the supplementals all testified were held in June, 1961, before the Aviation Subcommittee of the Senate Committee on Commerce and before a Subcommittee of the House Committee on Interstate and Foreign Commerce. At the hearings the Board made clear its opposition to any arrangement that would permit travel agents to solicit the general public in forming charter groups. See, e.g., Senate Hearings, *supra* n. 9, at 29.

Following the hearings each committee reported out its own bill. Under the Senate Bill the Board was expressly empowered to authorize supplemental carriers to operate inclusive tours.[11] With the express exception of the "all

[11] The bill defined "charter service" to mean:

"air transportation performed by an air carrier holding a certificate of public convenience and necessity where the entire capacity of one or more aircraft has been engaged for the movement of persons and their baggage or for the movement of property on a time, mileage, or trip basis, but shall not

expense-paid tour," the Senate bill was intended to prevent the Board from authorizing "individually ticketed service whether offered by an air carrier directly or by a travel agent." S. Rep. No. 688, 87th Cong., 1st Sess. 13-14 (1961). However it did not, as the Board contends, require that supplementals be certificated to operate inclusive tours. Its language was merely permissive, authorizing the Board to grant such authority when required by the public need and consistent with the capability and interests of the particular carrier. "[T]he bill does not require the Board to grant every supplemental carrier any particular charter authority." See S. Rep. No. 688, 87th Cong., 1st Sess. 12-13 (1961).

The bill passed the Senate on August 28, 1961.

The bill reported out by the House Committee, like the Senate bill, worked substantial changes in the legislation drafted by the Board. However, unlike the Senate bill, the House version did not define the term charter although that term is found in the bill's definition of supplemental air transportation.[12] The definition of "supplemental air transportation" included in the House bill was ultimately enacted by Congress as part of Public Law 87-528. See 49 U. S. C. § 1301(33).

Of particular importance in deciding what was the intended scope of the Board's powers under this bill which

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include transportation services offered by an air carrier to individual members of the general public or performed by an air carrier under an arrangement with any person who provides or offers to provide transportation services to individual members of the general public, other than as a member of a group on an all-expense-paid tour."

[12] "(33) 'Supplemental air transportation' means charter trips in air transportation, other than the transportation of mail by aircraft, rendered pursuant to a certificate of public convenience and necessity issued pursuant to section 401(d)(3) of this Act to supplement the scheduled service authorized by certificates of public convenience and necessity issued pursuant to sections 401(d)(1) and (2) of this Act."

was passed by the House on September 18, 1961, is the statement of the House Committee that its bill "would give the Board some, but not all, of the authority requested by it. The committee substitute would establish guidelines for the Board to follow in exercising its authority to certificate supplemental carriers, especially, in the field of individually ticketed operations." H. R. Rep. No. 1177, 87th Cong., 1st Sess. 6-7 (1961).

In deciding whether grant of inclusive tour authority violates the limitations of the statute it must be remembered "that a prime concern of Congress was to maintain the integrity of the charter concept—to preserve the distinction between group and individually ticketed travel." *American Airlines* v. *Civil Aeronautics Board, supra,* 348 F. 2d at 354. See Conference Report, H. R. Rep. No. 1950, 87th Cong., 2d Sess. 14 (1967).

It is clear that the fact that the Board has the power to define "charter" to include split charters (see *American Airlines* v. *Civil Aeronautics Board, supra,* 348 F. 2d 349), a device permitting the Masons and Elks each to charter one half of the capacity of an aircraft, does not mean that the Board is free to adopt a definition that contravenes basic policies laid down in the Act. To permit the selling of individual tickets to the general public in direct competition with the regularly scheduled airlines, regardless of whether such selling is done through the medium of a travel agent who has first "chartered" the plane, does violate basic policies of the Act. Any lingering ambiguities clouding this issue are dispelled by the subsequent history of the House and Senate bills, to which we now turn.

The conflicting House and Senate bills were submitted to a Conference Committee which reported out a substitute bill that was ultimately enacted as Public Law 87-528. The substitute followed the House version, eliminat-

ing the definition of the term "charter" found in the Senate bill. It is clear from the conference report that one purpose of the Committee in adopting the provisions of the House bill was to prohibit "individually ticketed and waybilled services on a permanent basis." [13] See Conference Report, H. R. Rep. No. 1950, 87th Cong., 2d Sess. 14 (1962).

Even more direct and more persuasive evidence is available concerning the intention of the conferees in striking from the bill the provision that would have permitted all expense package tours. Several of the bill's floor managers addressed themselves to this subject during the debate on the bill in their respective houses. They were unanimous in declaring that the "all-expense tours that were provided for in the Senate definition were not accepted by the House, and the Senate receded and concurred in [the House's] position on that." 108 Cong. Rec. 12322 (June 29, 1962) (remarks of Rep. Williams); see remarks of Rep. Walter, *ibid.* Their statements as to

[13] The statute as enacted permits only two exceptions to the general rule forbidding supplemental carriers to provide individually ticketed services. The first exception, Section 9 of Public Law 87-528 provided a two year period, now expired, during which the Board could authorize such services in order "to permit an orderly transition to an all-charter operation." Reprinted following 49 U. S. C. § 1371; See Conference Report, H. R. Rep. No. 1950, 87th Cong., 2d Sess. 7, 14 (1962). The second authorizes the Board to issue a "special operating authorization" for a period of 30 days subject to renewal for a maximum of 60 additional days. Such authorization, enabling a supplemental carrier to engage in individually ticketed operations, could be issued only on a showing that "the capacity for air transportation being offered by the holder of a certificate of public convenience and necessity between particular points in the United States is, or will be, temporarily insufficient to meet the requirements of the public or the postal service," or that there is a temporary requirement for such service between two points not regularly served by a scheduled carrier. Section 417 of the Act, 49 U. S. C. § 1387; see Conference Report, H. R. Rep No. 1950, 87th Cong., 2d Sess. 4 (1962); H. R. Rep. No. 1177, 87th Cong., 1st Sess. 2, 12-13 (1961).

this limitation on the Board's authority went unchallenged.

For example, Senator Scott stated:

> "The Senate bill proposed to modify the established concept of charter by permitting charters to 'a group on an all-expense-paid tour.' Such a group could have been assembled from the general public . . . .
>
> The committee of conference wisely eliminated the Senate provision. The bill thus, in effect, confirms the established law as to a charter in air transportation. There should be no question about that. The Congress has considered, and has rejected, a proposal to change the established meaning of charter so as to have permitted travel agent charters for all-expense tours. Such charters have no place in air transportation," 108 Cong. Rec. 12284-85 (June 29, 1962.)

Senator Thurmond stated:

> "I am advised that the CAB Bureau of Economics has advocated that a so-called all-expense tour concept be grafted onto the existing charter definition. This would be intolerable, and has been expressly rejected by the conferees. The Senate receded from its charter definition which included this all-expense tour provision." 108 Cong. Rec. 12285 (June 29, 1962).

In the House, Representative Harris, Chairman of the House Interstate Commerce Committee, made clear that while "the Senate proposed to change the well established meaning of 'charter,'" the House objected to the change.

> "A charter in the aviation field has always meant the engagement of the entire capacity of the aircraft for a particular purpose by a single engaging party. Travel agents, being agents for transportation services, rather than carriers themselves, have never been allowed to engage airplanes in their own name for their own account. Nor should they be allowed to.

That is why the House objected to the proposal of the Senate including the 'all-expense tour' language. As explained in the House report, we felt the Board should be in a position to deal effectively with any efforts to abuse the meaning of charter." 108 Cong. Rec. 12322 (June 29, 1962).

He went on to read a statement, identical to one submitted later by Representative Collier:

"The bill, as reported by the conference committee, contains no definition of charter. The law is well established that, in air transportation, charter means essentially the lease of the entire capacity of an aircraft for a period of time or a particular trip, for the transportation of cargo or persons and baggage, on a basis which does not include solicitation of the general public, or any device where individually ticketed services would be offered or performed under guise of charter. The basic concept being thus clear, it is important that the Civil Aeronautics Board, by regulation and other appropriate measures, make sure that charter serves its planeload service concept and is not employed as a subterfuge to perform individually ticketed services. Manifestly, the nature of such subterfuge may change from time to time, and the regulatory agency needs some flexibility to modify its regulations to guard against any new subterfuges that may emerge. For this reason, the House committee objected to any attempt to freeze into the act a definition of charter service which would prevent the Board from dealing effectively with abuses. Thus the bill, as passed by the House, contained no definition of charter.

The Senate bill, on the other hand, contained a definition of charter service. This was necessary, in large part, because the Senate proposed to modify the established concept of charter in order to permit carriage, as charter of 'a group on an all-expense paid tour.' The Senate conferees having receded

from insistence on the all-expense-paid tour exception, it followed that the remainder of the Senate definition was superfluous since it merely stated established law and policy." 108 Cong. Rec. 12322 (June 29, 1962); see *id.* at 12324 (remarks of Rep. Collier).

Senator Cotton said:

"The conferees agreed to drop the language in the Senate bill which defined charter service, and permitted the sale of tickets on charter flights to individual members of the general public who were on all-expense-paid tours. I am wholly in accord with the action in eliminating the all-expense tour provision and thus refusing to confer this power on the Board." 108 Cong. Rec. 12284 (June 29, 1962).

These statements are specific in rejecting the notion that the term charter can be construed to include all expense tours. We therefore reject the argument that the legislators' concern was with abuses growing out of the Board's prior practice of allowing supplemental carriers to perform limited scheduled individually ticketed travel. Regardless of the extent to which there may have been legislative concern based on this prior experience, indeed whether or not the expression of concern was misguided or wholly unwarranted, it was in fact manifested in a congressional declaration binding on both the Board and this court, that was clearly intended to forbid the Board to authorize inclusive tours.

The Board also argues that many of the statements made on the floor of Congress were directed against split charters as well and that the Board's power to authorize such charters has nevertheless been upheld. See *American Airlines* v. *Civil Aeronautics Board, supra*, 348 F. 2d 349. While we have no occasion to pass on the question of the propriety of split charters we note that Congressional concern with their potential impact is much less

clear from the Committee reports and hearings than is the intention to prohibit individually ticketed operations, in whatever guise, by supplemental carriers. Moreover, the legislative history involved in the inclusive tour question, with one house passing legislation that would have specifically empowered the Board to authorize package tours only to have the provision deleted by the Conference Committee with the floor managers unanimous in their explanations of the change, is not repeated in the case of split charters. See, e.g., 108 Cong. Rec. 12283 (June 29, 1962) (remarks of Sen. Monroney). On the contrary, the provision deleted from the Senate bill would in fact have forbidden split charters. See Section 101(13) of the bill, S. Rep. No. 688, 87th Cong., 1st Sess. 13, 22 (1961) (reprinted n. 11 *supra*).

But the Board urges that in construing the statute we should not give any weight to statements made in floor debate. In determining whether it had the power to authorize inclusive tours, the Board, finding the statute and committee reports clear, declared that there was "no sound reason for attempting to analyze the statements made at the time of the passage of the bill by certain of its floor managers." Board Order E-23350 (March 11, 1966).

We do not agree. That Congress adopted the House version of the bill, specifically rejecting the Senate's conflicting version, is of course an extremely significant factor in determining what was Congress' intention with respect to the matters in issue. See, e.g., *First Nat'l Bank v. Walker Bank*, 385 U.S. 252, 258 (1966). It would be foolish, indeed, to disregard the one source of legislative history that explains the reasons for the conference committee's action.

Nor are we here concerned with general remarks made in debate which contradict either the face of the statute

or statements in committee reports. On the contrary, we have before us on the one hand a statute that is not clear on its face and committee reports that seem to support petitioners' view although they can perhaps be deemed ambiguous. On the other hand we have statements made by the floor managers that fully explain the changes in the bill. These floor managers were members of the legislative committees that held extensive hearings and were responsible for formulating the legislation.[14]

Only recently, in circumstances similar to those in the instant case, a unanimous Supreme Court relied on statements made in debate, not only by a sponsor of legislation and by a member of the Conference Committee but also by other members of Congress, and regarded such statements as authoritative indicators of congressional intent. *First Nat'l Bank* v. *Walker Bank*, *supra*, 385 U.S. at 258-60; see also *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 311-23 (1962).

The authorities cited by the Board do not support the view that we may disregard or give little or no weight to statements made on the floor of Congress under the circumstances of this case. In *United States* v. *International United Automobile Workers (UAW-CIO)*, 352 U.S. 567 (1957) although the Court did say that debate is not entitled to the same weight "as carefully considered committee reports," it still examined the debate, finding that it confirmed what was contained in the reports. 352 U.S. at 586-87 & n. 1. *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 474-75 (1921) exhibits a similar treatment of Congressional debate. *Nicholas* v. *Denver & Rio Grande*

[14] For example, Representative Harris was the Chairman of the House Committee on Interstate and Foreign Commerce, Representative Williams was Chairman of the Subcommittee on Transportation and Aeronautics of which Representative Collier was a member, Senator Monroney was chairman of the Subcommittee on Aviation, Senators Thurmond, Cotton, Morton and Scott were on that committee.

*W. R. R.*, 195 F. 2d 428, 431-32 (10th Cir. 1952), whatever dictum the opinion may contain to the contrary, fully supports the position that we take here.

If, as we hold, Congress did not give the Board power to authorize inclusive tours, it is immaterial whether, as the Board contends, the proposed regulations will be effective in curbing abuses of the inclusive tour certificates.

Since the Motor Carrier Act is quite different from the Federal Aviation Act in language, statutory structure and legislative history, the fact that all expense tours have been approved under the Motor Carrier Act (see *National Bus Traffic Ass'n.* v. *United States*, 143 F. Supp. 689 (D. N. J. 1956), aff'd *per curiam*, 352 U.S. 1020 (1957)), is not at all persuasive in construing Public Law 87-528, even if we assume that the tours there authorized are similar to those approved by the Board in this case, an assumption that petitioners vigorously contest.

We hold that the certificates before us awarding inclusive tour authority to supplemental air carriers in foreign and overseas transportation are invalid.

Since our conclusion that the Board acted in excess of its statutory powers is dispositive of the case, we need not pass on the other points raised by petitioners.

The orders are set aside and the case remanded to the Board for futrher proceedings not inconsistent with this opinion.

## APPENDIX B

## UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 20,159

AMERICAN AIRLINES, INC., ET AL., PETITIONERS

*v.*

CIVIL AERONAUTICS BOARD, RESPONDENT
SATURN AIRWAYS, INC.,
WORLD AIRWAYS, INC.,
AMERICAN SOCIETY OF TRAVEL AGENTS, INC.,
TRANS INTERNATIONAL AIRLINES, INC.,
MODERN AIR TRANSPORT, INC.,
AMERICAN FLYERS AIRLINE CORPORATION,
JOHNSON FLYING SERVICE, INC.,
PURDUE AERONAUTICS CORPORATION,
CAPITOL AIRWAYS, INC.,
OVERSEAS NATIONAL AIRWAYS, INC., INTERVENORS

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On Petition for Review of an Order
of the Civil Aeronautics Board

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Decided July 19, 1966

*Mr. James F. Bell*, with whom *Mr. Brian C. Elmer* was on the brief, for petitioners. *Mr. George C. Neal* also entered an appearance for petitioners.

*Mr. Warren L. Sharfman*, Associate General Counsel, Litigation and Legislation, Civil Aeronautics Board, with

whom *Assistant Attorney General Turner*, *Messrs. Joseph B. Goldman*, General Counsel, *O. D. Ozment*, Deputy General Counsel, *Robert L. Toomey*, Attorney, Civil Aeronautics Board, and *Howard E. Shapiro*, Attorney, Department of Justice, were on the brief, for respondent.

*Mr. Raymond J. Rasenberger*, Attorney for intervenor Purdue Aeronautics Corporation, and *Clayton L. Burwell*, Attorney for intervenor Trans International Airlines, Inc., argued on behalf of all intervenors.

*Mr. Leonard Bebchick* was on the brief for intervenor Saturn Airways Inc. *Mr. Jerrold Scoutt, Jr.*, was on the brief for intervenor World Airways, Inc. *Mr. Ramsay D. Potts* was on the brief for intervenor American Flyers Airline, Inc. *Mr. Dayton M. Harrington* was on the brief for intervenor Capitol Airways, Inc. *Mr. Warren E. Miller* was on the brief for intervenor Johnson Flying Service, Inc. *Mr. Albert F. Beitel* was on the brief for intervenor Modern Air Transport, Inc. *Mr. Howard S. Boros* was on the brief for intervenor Overseas National Airways, Inc. *Mr. Charles A. Hobbs* was on the brief for intervenor American Society of Travel Agents, Inc.

*Mr. Walter D. Hansen* also entered an appearance for intervenor Trans International Airlines, Inc.

*Mr. Stephen D. Potts* also entered an appearance for intervenor American Flyers Airlines Corporation.

Before: DANAHER, *Circuit Judge*, BASTIAN, *Senior Circuit Judge*, and TAMM, *Circuit Judge*.

TAMM, *Circuit Judge*: This case presents essentially a question of statutory construction. It grows out of the protracted and absorbing battle over the years between the regularly scheduled airlines and the so-called "supplemental" airlines. The petitioners here comprise all but one of the domestic "trunkline" air carriers, plus Pan American World Airways. Their traditional role in air trans-

portation has, of course, been to provide regularly scheduled air transportation service. The intervenors are "supplemental air carriers" who have also been known variously as "nonscheduled" and "large irregular" airlines.[1] Their traditional function has been limited to supplementing the scheduled airlines, principally through military and civilian charter service.

In 1962, Congress enacted Public Law 87-528 as an amendment to the Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. § 1301 *et seq.* These amendments authorized the Civil Aeronautics Boards (hereinafter the Board) to issue certificates of public convenience and necessity for "supplemental air transportation," statutorily defined simply as "charter trips in air transportation." Section 101(33) of the Federal Aviation Act of 1958, 72 Stat. 737, as amended, 75 Stat. 467, 76 Stat. 143, 49 U.S.C. § 1301. It is the uncertainty over the meaning of the term "charter trips" which prompts the necessity for interpretation of the statute, particularly as to whether such term embraces "inclusive tour charters." These inclusive tour charters are charters by supplementals to tour operators who, in turn, sell individual space on the chartered aircraft to the general public as part of an "inclusive tour."[2] In order for us to proceed to the actual interpretation of the statute, it is first necessary to briefly delineate the legislative history of the Act and the administrative interpretation which has been placed on the statute by the Board.

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[1] The American Society of Travel Agents has also intervened in these proceedings for reasons which will become apparent, *infra*.

[2] The term "inclusive tour" is generally synonymous with an "all-expense tour." The Board has adopted the term "inclusive tour" rather than "all-expense tour" because all expenses are not necessarily required to be included in the tour price. We will adopt the Board's terminology in this case.

## I.

### Legislative History

Early in the 87th Congress, bills which had been prepared by the Board were introduced in both the Senate (S. 1969) and the House (H.R. 7318). Hearings were held in June 1961 before the Aviation Subcommittee of the Senate Committee on Commerce and the Subcommittee of the House Committee on Interstate and Foreign Commerce. Representatives of the Board, the supplemental air carriers, and the certificated air carriers appeared at these hearings.

On August 8, 1961, S. 1969 was reported out by the Senate Committee with committee amendments altering in part the original Board proposal. In its reported bill, the Senate committee proposed that "charter service" should be defined to include authority for tour operators to charter planes from supplementals for the purpose of offering space to individual members of the general public as part of inclusive tours. Sen.Rep. No. 688, 87th Cong., 1st Sess. 1 (1961).[3] In its Report, the Committee specifically noted that

> "it is not the intention of the committee to permit individually ticket service to be offered to the general public under the guise of charter. The proposed statutory definition, therefore, provides that charter shall not include such individual ticketed service

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[3] "(13). 'Charter service' means air transportation performed by an air carrier holding a certificate of public convenience and necessity where the entire capacity of one or more aircraft has been engaged for the movement of persons and their baggage or for the movement of property on a time, mileage, or trip basis, *but shall not include transportation services offered by an air carrier under an arrangement with any person who provides or offers to provide transportation services to individual members of the general public, other than as a member of a group on an all-expense-paid tour.*" (Emphasis added.)

whether offered by an air carrier direct or by a travel agent.

This restriction is subject to one exception because *there is one circumstance in which a carrier or travel agent may offer the services to individual members of the public and still conform to the traditional concept of charter.* This is in connection with an all-expense-paid group tour. If a travel agent charters an aircraft for an all-expense-paid tour and then offers to individual members of the public the right to participate as a member of the group, *this is a very different sort of service from individually ticketed transportation.*" Sen. Rep. No. 688, 87th Cong., 1st Sess. 13-14 (1961). (Emphasis added.)

The amended administration bill passed the Senate on August 28, 1961.

Simultaneously with the Senate action, the House committee held hearings and reported out its bill. The House bill did not contain a definition of "charter service," leaving the term undefined, as it was in the then-existing statute. In its Report, the House committe explained its reason for not including a definition of charter service thusly:

"The supplementals recommended that a definition of charter be written into the bill and this was given consideration by your committee. The bill passed by the Senate has such a definition.

"Your Committee, however, after considering the problem came to the conclusion that under the circumstances, authority to define charter services *should be left, as at present, with the Board,* subject to the limitations contained in the reported bill. This is a very difficult subject and any effort to freeze a definition of charter service into law could well lead into complications. H. Rep. No. 1177, 87th Cong., 1st Sess. 5 (1961). (Emphasis added.)

The House bill, as amended, was passed by the House on September 18, 1961.

With the bills thus at least potentially in conflict, the Senate and House conferees met to resolve their differences. The bill reported out by the conferees did not contain a definition of charter. The conference report to accompany the agreed-upon bill indicated that the conferees had adopted the House version on the issue in question, elimination the definition of "charter service" originally contained in the Senate bill. This conference report, however, did not discuss the reasons why the House version was adopted over that proposed by the Senate.

Petitioners argue here that the Senate "receder" from its position on inclusive tours and that the bill as finally passed withheld from the Board any authority to authorize inclusive tours by supplementals through travel agents. Respondents and intervenor, on the other hand argue that the "recession" by the Senate was only from the position that the Board should be *required* to grant inclusive tour charter authority to the supplementals (which would have been the effect of the original Senate formulation) to the position of the House, which, as explained in its Report, was that "authority to define charter services should be left, as at present, with the Board * * *"

In support of their argument, petitioners point to the statement of six members of the Congress in the legislative debates at the time of the passage of the final bill before both houses of the Congress. Representative of these statements, which will be considered in more detail, *infra*, is that of Senator Scott, a Senate manager of the bill. He stated, in pertinent part, that

> "the committee of conference wisely eliminated the Senate provision. The bill thus, in effect, confirms

> the established law as to a charter in air transportation. There should be no question about that. The Congress has considered, and rejected, a proposal to change the established meaning of charter so as to have permitted travel agent charters for all-expense tours. Such charters have no place in air transportation. This being the thrust of the congressional action, it would be clearly improper if the Civil Aeronautics Board were hereafter to undertake to rewrite the law and to authorize under guise of charter, all-expense-tour operations * * * ." 108 Cong. Rec. 12284-85 (1962).

The question thus clearly proposed for our determination is whether the Federal Aviation Act of 1958, as amended, limits the Board's power to authorize inclusive tour charters. Before resolving this question, some assistance in making our determination may be forthcoming from a consideration of the Board's resolution of the issue.[4]

## II

### Administrative Interpretation

In analyzing this question, the Board framed the issue in the following language:

> "Under the definition of supplemental air transportation in section 101(33) of the Act, we may authorize supplemental air carriers to engage solely in 'charter trips.' The argument is made that the term 'charter trip' does not include charters to tour operators acting as indirect air carriers for the purpose of transporting inclusive tour groups whose members are gathered from the general public, and that charters would be mere subterfuges for individually

[4] Although we have primary jurisdiction to interpret the enabling and regulating statutes of administrative agencies, the interpretation placed upon its enabling or regulating statute by the agency itself is not without some weight in the final resolution of such interpretation questions.

ticketed transportation. The argument is based primarily on the claim that, while the statute does not spell out a prohibition against inclusive tour charters, its legislative history expresses such an intention. The examiner correctly rejected this argument." [5]

In resolving the issue, the Board relied primarily upon two propositions: First, that the legislative history of the Amendment demonstrated that the definition of charter was to be left to the Board; and second, that this court's decision in *American Airlines, Inc., et al.* v. *C.A.B.*, —— U.S. App. D.C. ——, 348 F.2d 349, 354 (1965) clearly demonstrates that the question of definition of charter was to be left to the Board. The Board found additional analogical support for its interpretation in precedent and practice in the field of surface transportation, where the legality of inclusive tour charters has long been settled "as against contentions that they are mere subterfuges for individually ticketed transportation." [6]

The Board interpreted the previously delineated sequence of legislative events as clearly indicating that the definition of charter was to remain a function of the Board. It relied heavily upon the House committee report which specifically stated that "authority to define charter services should be left, as at present, with the Board, * * *" H.Rep. No. 1177, 87th Cong., 1st Sess. 11 (1961). Finding the meaning of the statute to be clear, especially as reinforced by the sequence of events in the Senate and the House and the authoritative committee reports explaining these events, the Board did not believe that there was any "sound reason for attempting to analyze the statements made at the time of the passage of the bill by certain of its floor managers." [7]

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[5] Board Order E-23350 (March 11, 1966).

[6] Board Order E-23350 (March 11, 1966).

[7] Board Order E-23350 (March 11, 1966).

In the 1965 *American Airlines* case cited by the Board (known as the *Transatlantic* case), this court also had occasion to interpret the meaning of the term "charter trips" as used in the 1962 amendments to the 1958 Federal Aviation Act. The specific question presented in that case was whether the Board had the power under the statute to authorize supplemental carriers to charter space to two groups on one aircraft, *id est*, "split charters." The same petitioners in the present case attacked split-chartering there on the ground that the legislative history of the Act demonstrated the Congress intended that the Board should have no authority to authorize supplemental carriers to charter aircraft for "split charters."

This court rejected the argument of the scheduled airlines stating:

> "We are unable to conclude that the term 'charter trips' has a fixed meaning . . . We conclude Congress intended, although not without limits, that the Board should be free to evolve a definition in relation to such variable factors as changing needs . . . We agree with the Board that the legislative history reveals that a prime concern of Congress was to maintain distinction between group and individually ticketed travel; within these limits it is for the Board to evolve reasonable definitions." 348 F.2d at 354.

The Board summed up its analysis of the legislative history by concluding that:

> "Considering all of the foregoing, we are persuaded that we have the power to authorize inclusive tour charters as 'charter trips' under section 101(33) provided that we preserve the basic distinction between group and individual travel." Board Order E-23350 (March 11, 1966).

## Judicial Interpretation

The question which this Court must decide is brought into bold relief against the background heretofore sketched: Given the fact that the term charter trip is not defined in the Act itself, and the further fact that the Board had pre-existing authority to determine the definition of charter, does the legislative history of the Amendments indicate that Congress intended the Board to continue to have this power (such intention being expressed principally in the House committee report), or does the legislative history demonstrate that Congress intended to withdraw such authority from the Board (such intention being expressed in the debates on the floors of the houses of Congress)? Although the question could be more simply stated as whether a clearly demonstrated intention contained in a committee report takes precedence over a clearly demonstrated contrary intention in the floor debates, we do not believe the question to be quite so narrow. The overall policy and purpose of the Act and the demonstrated understanding of the Congressmen as to the meaning of the points in issue must also be taken into account in finally resolving the question. Based upon our analysis of the legislative history and overall policy and purpose of the legislation, we conclude that the Congress did not intend to withdraw this authority from the Board and that the Board's decision in the instant case must therefore be affirmed.

We look first to the Congressional declarations as to the purposes of the Act. Perhaps the most succinct statement concerning the purpose of the legislation was that made by Senator Monroney, who was chairman of the Senate Subcommittee which held hearings on the legislation, and the Senate floor manager of the bill. He stated:

> "Mr. President, this is a very complicated and difficult piece of legislation . . . It seeks to provide a permanent place in the aviation industry for supple-

mental air carriers without adverse effect upon scheduled carriers . . ." 107 Cong. Rec. 17162 (Aug. 28, 1961).

An overall reading of the legislative history indicates that the three primary purposes of the 1962 legislation were: to eliminate irresponsible supplementals, especially those violating safety regulation; to stabilize the operating authority of the supplementals under certificates, including authority to authorize "charter trips" on a broad enough basis so that through performance of civilian and military charter operations the supplementals might remain viable economic organizations capable of meeting supplemental tranportation needs and able to comply fully with safety requirements; to maintain the regulatory scheme of the Federal Aviation Act and the protection of the certificated carriers such as petitioners by eliminating unregulated individually ticketed point-to-point competition from the supplementals.[8]

Apparently the all-consuming quesion with respect to the authorization of inclusive tour charters was whether allowance of such would violate the third purpose of the Act, id est, the prevention of individually ticketed point-to-point competition to the scheduled airlines by the supplementals. This fear arose partly out of the fact that supplementals had previously been allowed to perform scheduled individually ticketed travel not to exceed ten trips per month between any two points, in the United States. Pooling operations between various supplementals caused abuses to grow up in the utilization of this authority. Groups of carriers would combine their operations

[8] See, *e.g.*, S. Rep. No. 688, 87th Cong., 1st Sess. 21 (1961); H. Rep. No. 1177, 87th Cong., 1st Sess. 6 (1961); 107 Cong. Rec. 20081 (Sept. 18, 1961—statement of Rep. Harris); Hearings before Subcommittee of Commerce Committee on H.R. 7512, and H.R. 7675, 87th Cong., 1st Sess., 13, 29, 74, 91, 156, 218-19; Hearings before the Aviation Subcommittee of Commerce Committee on S. 1969, 87th Cong., 1st Sess., 268, 270, 281, 282-83.

and provide daily services claiming at least color of authority under the ten-flight per month authorization. The problem created by the pooling operations was highlighted in the Senate and House Committee Reports. For example, in the House Report it was noted that

> "the de facto pooling of operating authorizations followed by protracted judicial proceedings before the operations could be curtailed had created a serious regulatory problem which the supplemental carrier legislation was designed to eliminate." H. Rep. No. 1177, 87th Cong., 1st Sess. 13 (1961). See also Senate Rep. No. 688, 87th Cong., 1st Sess. 16, *et seq.* (1961).

The scheduled airlines were naturally alarmed that the supplementals were diverting passenger traffic. The ten-trip per month individually ticketed authority was withdrawn from the supplementals as a result of the 1962 legislation. The supplementals were relegated as a result of the legislation to the performance of civilian and military charter service.

It is thus apparent that the concern over individually ticketed authority was essentially a product of the supplementals' previous authority to perform individually ticketed travel not to exceed ten trips per month between any two points in the United States. This authority was completely independent of any charter definition.[9] The question of inclusive tours was, however, a definite part of the question of charter definition. Analysis of the statements of the floor managers in the debates indicates that they were fearful that the same abuses which had grown up through utilization of the individually-ticketed-travel-not-to-exceed-ten-trips-per-month authority would come about as a result of the inclusive tour authorization. For example, Senator Cotton stated that:

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[9] Sen. Rep. No. 688, 87th Cong., 1st Sess. 11-15 (1961).

"the elimination from the bill of the general Senate language defining charter service should not, however, in my view, be construed as giving the Board any kind of carte blanche with respect to long-established principles of law relating to charters. The Civil Aeronautics Board has, in the past, rejected proposals to water down the safeguards against the abuse of charter service, and I hope the Board will continue to be firm in this respect. The Board has a serious obligation to see that charter services *do not become individually ticketed services through subterfuge or abuse.*" 108 Cong. Rec. 12284 (June 29, 1962). (Emphasis added.)

Senator Thurmond stated:

"I am advised that the CAB Bureau of Economics has advocated that a so-called all-expense tour concept be grafted onto the existing charter definition. This would be intolerable, and has been expressly rejected by the conferees. The Senate receded from its charter definition which included this all-expense tour provision.

* * * *

"Air transportation has suffered from the abuses of individually ticketed operations. The law violations in this area have all too frequently extended to infractions of safety provisions as well. It is for this reason that I want to emphasize the insistence of Congress that supplemental charter operations shall be confined to full plane load charter operations exclusively." *Id.* at 12285.

Representatives Harris and Collier submitted identical statements to the effect that

"the law is well established that, in air transportation, charter means essentially the lease of the entire capacity of an aircraft for a period of time or a particular trip, for the transportation of cargo or persons and baggage, on a basis which does not include

solicitation of the general public or *any device where individually ticketed services would be offered or performed under guise of charter.*" *Id.* at 1232-24. (Emphasis added.)

The primary fear of the legislators was that supplementals would divert traffic from the scheduled airlines through utilization of individual ticketed authority. However, this evil was know to the legislators only through the abuses which grew out of the ten-trip-per-month authority. Prior to 1962 the Board had never authorized inclusive tour authority for the supplementals. Thus it is apparent that the apprehensions of the legislators did not grow out of any experience with inclusive tour charters, but rather was a projected fear based upon the unhappy experience with the ten-trip-per-month authority.

The question therefore arises as to whether authorization of inclusive tour charters will in fact bring about the individually ticketed abuses experienced under the ten-trip-per-month authority. The Board found that such abuses would not ensue. In order to insure that the supplementals were properly regulated in this respect, and to insure that the individual ticketing abuses would not occur, the Board issued stringent regulations at the time of its decision in the instant case to cover inclusive tour charters.[10] The key to this case, we believe, is the fact that the Congress at the time it passed the legislation had no way of knowing specifically how the Board would regulate the actions of the supplementals with respect to inclusive tour charters. Based upon the then past experience, a reasonable fear of the legislators was that inclusive tour charters might be abused in the manner that the ten-trip-per-month authority had been abused so as to make incursions into the scheduled airlines' passenger services. Lacking specific knowledge of the Board's regu-

[10] C.A.B. Special Regulations, Part 378.

lations, the legislators logically relied upon past experience. This analysis is supported by reference to the legislative history. For example, Senator Scott stated:

> "Another essential element is that the person who charters an airplane cannot resell the space to individuals or solicit the general public to buy space. This is necessary to prevent breakdown of the regulatory system, and most particularly the rate regulatory system. If this were not one of the rules, a travel agent could charter an airplane, and then offer the seats to the general public *at less per head than the tariff fares the airplane must observe as to each passenger.*" 103 Cong. Rec. 122284 (June 29, 1962).

The fears of Senator Scott that the regulatory system will be disrupted and that the travel agents will be able to sell seats to the general public at less per head than the price charged by the scheduled airlines are met and answered by the Board's regulation. The regulations specifically require that the tour price charged by the agent can be no lower than 110% of the lowest available fare (including stopover charges) offered by the scheduled route carriers "for individually ticketed service on the circle route beginning at the point of origin, to the various points where stopovers are made, and return to the point of origin." It is apparent, therefore, that under the Board's regulations the inclusive tour charge will always be at least 10% higher than the price of the lowest available fare offered by the competing scheduled airlines for comparable transportation.

We believe that an analysis of the regulations will demonstrate even further that the Board has effectively precluded the possibility that the fears apprehended by the legislators will in fact be realized. In addition to the 110% of the lowest fare requirement already referenced, the regulations require: that each inclusive tour make a minimum of three stops (not including the point of

origin), each stop to be not less than fifty air miles apart; that a "minimum of seven days must elapse between departure and return"; that every tour operation must be performed on a round-trip basis; that the tour price shall include, at a minimum, all hotel accommodations and necessary air or surface transportation between all places on the itinerary, including transportation to and from air and surface terminals utilized at such places other than the point of origin; that every tour must be operated by a regulated tour operator who charters aircraft for such tours from a certified supplemental air carrier.

In addition to these stringent requirements, the Board's regulations require: that *prior approval* of the tour proposal must be obtained from the Board by the tour operator and the supplemental air carrier; that the prospective tour operators file a statement containing a detailed picture of their experience, business structure, and financial condition. The tour operator's application must include, among other data: a statement of the tour operator's qualifications; the time and dates of the flights; the type of aircraft; a detailed statement of the tour itinerary, including such things as the name of the hotels, length of stay, etc.; the tour price; the number of persons expected to participate; the charter price of the aircraft; and samples of the solicitation material to be used to promote the tours. Each application must be verified by the supplemental carrier and tour operator and filed 90 days in advance of the operation. Each application must be served on each direct air carrier serving the points involved in the tour operation and such direct air carriers may object to such tours within ten days thereafter. The sale of tour charters by supplementals is restricted to tour operators granted indirect air carrier authority by the Board pursuant to the Board's regulations, which authority may be suspended by the Board without a hearing. No supplemental air carrier may perform any tour charter trips unless it has on file with the Board a currently effective

charter tariff showing all rates, fares and charges. All tour operators operating inclusive tour charters must furnish a surety bond in the amount of at least twice the charter price. The Board's regulations contain certain requirements pertaining to the contract between the supplemental air carrier and the tour operator, and the contract between the tour operator and the tour participant. The supplemental carrier and the tour operator must make a post-tour report to the Board.

In addition to these stringent restrictions on the supplementals and the tour operators, the Board limited its inclusive tour authorization to a test period of five years and indicated that it would then "review the tour program to determine if it fulfilled its promise." In the interim, the Board noted that experience might show need for modification either "to prevent undue diversion" or to "relax restrictions that may prove too onerous," and noted that its "rule-making powers" would permit it to deal with such situations as they arose. Finally, in summing up its reasons for adopting the inclusive tour charter operation the Board noted:

> "The use of the charter mechanism, combined with the restrictions which we are imposing by regulation, necessarily results in a service to the public which is different in significant respects from that available on scheduled services. In exchange for realizing the price savings accruing from the economies of planeload charter operations, the charter tour passenger is subjected to the rigidities of a group itinerary, must be willing to travel and share facilities with strangers, and must agree to the necessary regimentation that is entailed in group travel. Nor will he have the freedom to select from the multiple daily schedules offered by route carriers, but will be confined to predetermined departure and arrival times selected by the tour operator. Moreover, it is clear that the specially tailored type of service to be

provided is not one which could practicably be furnished by route carriers on their scheduled operations." Board Order E-23350 (March 11, 1966).

The foregoing analysis of the Board's regulations and its reasons for adopting them provides, we believe, a reasonable basis for a conclusion that the individual-ticketing problems foreseen by the legislators will be precluded. We do not find in the Board's actions any arbitrary exercise of its powers, and we believe that its conclusions are supported by substantial evidence on the record as a whole. Moreover, the Board found, in the exercise of its administrative expertise, that a significant amount of the revenues of the supplemental carriers earned through inclusive tour charters would be *newly generated* traffic, rather than traffic diverted from existing services, and that in the long run this will tend to broaden the base for air transportation and ultimately inure to the benefit of the entire air transportation industry, *including the scheduled airlines.*[11] The promotion by the Board of this salutary result is hardly assailable as an arbitrary exercise of its power. In addition, the Board found that the authorization of inclusive tour charters would give the supplementals a new lease on their economic life by helping them to generate more civilian traffic. The principal revenues of supplementals (over 70%) arise from mili-

[11] The hearing examiner found (affirmed by the Board), that inclusive tour charters had been utilized in England and that the British experience has demonstrated that there is no serious diversion from the scheduled airlines. He quoted an advisor to a scheduled airlines as follows:

> "For the most part these were passengers who would not have travelled by air on normal scheduled services. They were persuaded to fly by the attractive prices and great convenience of the packaged holidays offered. The real importance of inclusive tour services to British civil aviation lies in the fact that a very large number of people have been converted into air travellers through the promotional efforts of the organizers of air tours. In this way, the financial and social boundaries of the air travel market have been greatly extended."

tary charters. The Department of Defense now requires that carriers receiving contracts secure "at least 30% of their air transportation revenues during 1966 from commercial sources." The effect of this requirement is that increased civilian business is essential to the maintenance or increase of the vital military charter business. This increase in revenues is also critical to the financial well-being of the supplementals.

We believe that, if the statements of the floor managers are considered in the light of the foregoing analysis, and sight is not lost of the fact that the legislators did not in fact have the Board's regulations before them when the Act was passed, the Board's interpretation of its statutory power comports with the overall statutory intention of Congress. Although specific conflict does exist to some degree between the statements on the floors of the houses, and the Act itself and the House committee report, much of that conflict is dissipated by the above analysis of the evil apprehended by the legislators and the measures adopted by the Board to prevent its occurrence. Any remaining conflict must give way to the generally accepted maxim of statutory construction that reports by the legislative committees responsible for formulating the legislation must take precedence in event of conflict over statements in the legislative debates on the floors of the houses of Congress. See *United States* v. *United Auto Workers*, 352 U.S. 567, 585 (1950); *Nicholas* v. *Denver & R.G.W.R. Co.*, 195 F.2d 428 (10th Cir. 1952); *Duplex Co.* v. *Deering*, 254 U.S. 443, 474 (1920).

Finally, our decision here is in conformity with Judge Burger's well-reasoned opinion in the *American Airlines* case. We believe with Judge Burger that:

> "We are unable to conclude that the term charter trips has a fixed meaning or that Congress intended to restrict the Board to a definition of one aircraft—one charter. We conclude that Congress intended

> although not without limits, that the Board should be free to evolve a definition in relation to such variable factors as changing needs and changing aircraft; . . . We agree with the Board that the legislative history reveals that a prime concern of Congress was to maintain integrity of the charter concept—to preserve the distinction between group and individually ticketed travel; within these limits it is for the Board to evolve reasonable definitions." 348 F.2d at 354.

The order of the Board must therefore be

*Affirmed.*

## APPENDIX C

### Statutes Involved

I. Federal Aviation Act of 1958

§ 101 (49 U.S.C.A. 1301). Definitions—

As used in this chapter, unless context otherwise requires—

(33) "Supplemental air transportation" means charter trips in air transportation, other than the transportation of mail by aircraft, rendered pursuant to a certificate of public convenience and necessity issued pursuant to section 401 (d) (3) of this Act to supplement the scheduled service authorized by certificates of public convenience and necessity issued pursuant to sections 401 (d) (1) and (2) of this Act.

§ 401 (49 U.S.C.A. 1371). Certificate of public convenience and necessity—Essentiality

(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

(d) (3) In the case of an application for a certificate to engage in supplemental air transportation, the Board may issue a certificate, to any applicant not holding a certificate under paragraph (1) or (2) of this subsection, authorizing the whole or any part thereof, and for such periods, as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform the transportation covered by the application and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder. Any certificate issued pursuant to this paragraph shall contain such limita-

tions as the Board shall find necessary to assure that the service rendered pursuant thereto will be limited to supplemental air transportation as defined in this Act.

* * * * *

§ 801 (49 U.S.C. 1461). The President of the United States

The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof.

* * * * *

§ 1006 (49 U.S.C. 1486). Orders of Board and Administrator subject to Review

(a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

## APPENDIX D

## JUDGMENT

## UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of July, one thousand nine hundred and sixty-seven.

Present: HON. PAUL R. HAYS,
HON. WILFRED FEINBERG, Circuit Judge,
HON. EDWARD C. McLEAN, District Judge.

PAN AMERICAN WORLD AIRWAYS, INC., TRANS WORLD AIRLINES, INC., AMERICAN AIRLINES, INC.,
*Petitioners,*

*v.*

CIVIL AERONAUTICS BOARD,
*Respondent,*

AMERICAN SOCIETY OF TRAVEL AGENTS, INC., WORLD AIRWAYS, INC., SATURN AIRWAYS, INC., TRANS INTERNATIONAL AIRLINES, INC., PURDUE AERONAUTICS CORP. (PURDUE), AMERICAN FLYERS AIRLINE CORP.,
*Intervenors.*

A petition for review of orders of the Civil Aeronautics Board together with a motion by the respondent to dismiss the petition for lack of jurisdiction or in the alternative to transfer the action to the United States Court of Appeals for the District of Columbia.

This cause came on to be heard on a transcript of record certified by the Civil Aeronautics Board and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that said orders be and they hereby are set aside and that the action be and it hereby is remanded for further proceedings not inconsistent with the opinion of this court, with costs to the petitioners.

Further ordered, adjudged and decreed that said motion be and it hereby is denied.

A TRUE COPY

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk